

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEO NILGES)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket Nos. 1,046,360
and)	1,046,362
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	

ORDER

STATEMENT OF THE CASE

This matter, decided by the Workers Compensation Board (Board) in its Order of February 24, 2011, is now before the Board on remand from the Kansas Court of Appeals from its November 23, 2011, Opinion in No. 105,787.¹ Respondent originally requested review of the November 9, 2010, Award, as well as review of an Order dated November 4, 2010, both entered by Administrative Law Judge Brad E. Avery.² The Board heard oral argument in this matter on April 10, 2012. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

In the Order dated November 4, 2010, the Administrative Law Judge (ALJ) sustained the objection of claimant's attorney to the admission of Exhibits 2, 3, 4 and 5 to

¹ *Nilges v. State*, 46 Kan. App. 2d 888, 266 P.3d 587 (2011).

² Docket Nos. 1,046,360 (Date of accident 4-21-08) and 1,046,362 (Date of accident 1-15-09) were consolidated, and both the ALJ's Award and the Board's 11-4-10 Order were entered in both docketed cases. In No. 1,046,362, the ALJ denied benefits, finding claimant suffered no permanent injury as a result of his January 15, 2009, accident. The Notice of Appeal listed Docket No. 1,046,360 only. Nevertheless, as the two docketed claims were consolidated, this appeal is of the ALJ's Award, which includes both docketed claims. During the April 10, 2012, oral argument to the Board, the parties agreed that there were no issues being raised in Docket No. 1,046,362 and, therefore, the ALJ's determination could be treated as final.

the deposition of Dr. Chris Fevurly. During oral argument to the Board, claimant's attorney withdrew the objections to the admission of those exhibits and the parties agreed that the Board should consider those exhibits as part of the record for review in this appeal.

In the Award entered November 9, 2010, the ALJ found that claimant provided respondent with timely written claim of his accident of April 21, 2008. The ALJ found that based on the nature of claimant's injury, the rating opinion of Dr. P. Brent Koprivica was more appropriate than was that of Dr. Chris Fevurly and that claimant had a 15 percent functional impairment to the body as a whole. Claimant was terminated from his job at respondent, and the ALJ found he was entitled to a work disability of 75 percent, based on a 100 percent wage loss and a 50 percent task loss.

ISSUES

In Docket No. 1,046,360, respondent argues that claimant is not entitled to an award of work disability as he only suffered a scheduled injury to his shoulder. In the event the Board finds that claimant is entitled to an award of work disability, respondent contends that claimant failed to prove his task loss.

Claimant asserts that both Drs. Koprivica and Fevurly agreed that claimant sustained a permanent impairment of function to the body as a whole for an aggravation of preexisting degenerative disc disease. Claimant also contends that respondent's argument that certain tasks were left off Dick Santner's task list is conjecture and that claimant has a 50 percent task loss as per the testimony of Dr. Koprivica. During oral argument to the Board, counsel for claimant announced that there were no issues concerning unauthorized and future medical.³

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's disability?
 - (a) Did claimant suffer a scheduled injury or an injury to the body as a whole?
 - (b) What is claimant's percentage of functional impairment?
 - (c) Was the task list prepared by Dick Santner complete?

³ Those were listed as issues in Claimant's Brief to the Board of Appeals Upon Remand filed January 30, 2012.

- (d) What is claimant's percentage of task loss?
- (e) What is claimant's percentage of permanent partial disability?⁴

FINDINGS OF FACT

Claimant was employed by respondent as an equipment operator with the Kansas Department of Transportation (KDOT). As such, he performed maintenance on highways, repaired signs, mowed, and worked on culverts. On April 21, 2008, claimant had climbed on the back of a water truck to fasten down a lid. On his way off the truck, his feet slipped. He had both hands on the top of the bed of the truck; and when his feet slipped, he felt a yank on his right shoulder. He immediately felt pain in his shoulder area, and within a couple hours started having pain in his upper back. The Kansas Court of Appeals noted in its opinion that "there is no question that Nilges [claimant] timely notified his supervisor of his accident on April 21, 2008."⁵

Claimant continued to work and continued to have pain in his right shoulder and upper back. He said he was unable to perform some parts of his job, especially those that involved lifting above his head. Claimant said that he would ask coworkers to do the heavy lifting involved in his job. Two of claimant's coworkers, Wesley Leisure and John Bruns, corroborated claimant's testimony that coworkers assisted him in performing his job duties. Garrett Brandt, claimant's supervisor, testified he had no discussions with claimant or any other employee about whether claimant was able to perform all his job functions because of physical problems with his shoulders or upper back.

Claimant missed time from work because he sought treatment on his own from a chiropractor, Dr. Larry Buck.⁶ The first time claimant saw Dr. Buck after the April 21, 2008, accident was on May 2, 2008. At that time, claimant described his accident at work on April 21, 2008, when he fell from a truck. He had complaints of right shoulder pain and pain between his shoulders. Dr. Buck treated claimant's right shoulder and his thoracic and cervical spine areas. On his subsequent visit on May 30, 2008, claimant voiced these

⁴ Respondent/appellant did not file a brief to the Board upon remand from the Court of Appeals. But respondent's original brief to the Board following the appeal from the Award entered by the ALJ stated that all of the issues raised by respondent pertained to docket No. 1,046,360. The brief of claimant/appellee filed January 30, 2012, listed the issues as "I. Nature and extent of disability; and II. Unauthorized and future medical." Issue No. II applied only to Docket No. 1,046,360, as all benefits were denied by the ALJ in Docket No. 1,046,362 and claimant/appellee's brief "requests that the original decision of the Administrative Law Judge be affirmed in all respects." Claimant's Brief to the Board of Appeals Upon Remand filed January 30, 2012, at 8.

⁵ *Nilges v. State*, 46 Kan. App. 2d 888, 891, 266 P.3d 587 (2011).

⁶ Claimant had been treated by Dr. Buck previous to his accident on April 21, 2008. He was not being treated for any specific injury or problem but only to make sure he "stayed in line." R.H. Trans. at 11.

same complaints, as well as cervical spine pain. In addition, claimant had complaints of right knee pain, headaches, and muscle spasm at the base of his skull. Claimant's subsequent visits included these same or similar complaints.

Respondent eventually provided claimant with medical treatment with Dr. John Carter at the Olathe Occupational Medical Clinic. Dr. Carter took x-rays of claimant's right shoulder and sent claimant to physical therapy. Claimant also had an MRI of his upper back, neck and right shoulder areas. Claimant was later referred to Dr. Adrian Jackson by respondent, and again was sent to physical therapy. However, none of the treatment helped, and in January 2010, Dr. Jackson released claimant from treatment with no restrictions. Claimant said he tried to work, but he did not get along very well.

Dr. P. Brent Koprivica, who is board certified in preventative medicine and occupational medicine, examined claimant twice, both times at the request of claimant's attorney. Dr. Koprivica reviewed claimant's medical records and MRI scan that showed two disc herniations, one at C5-6 and one at C6-7. He first saw claimant on August 6, 2009. Claimant gave Dr. Koprivica a history of injury in April 2008 when his feet slipped out from under him while trying to put a lid on a water truck, and instead of falling to the ground, he held himself up by grabbing hold with both arms. In so doing, claimant jerked his neck. Dr. Koprivica said that type of sudden, unexpected force in the neck and upper back could result in a disc herniation. Claimant also gave Dr. Koprivica a history of a second accident that occurred in January 2009 when a chair collapsed from under him. Claimant told Dr. Koprivica that after the second accident, he had an escalation of his symptoms.

Based on the history, the medical records, the MRI, and his physical examination of claimant, Dr. Koprivica diagnosed claimant with chronic cervical thoracic pain due to an aggravating injury of a permanent nature to degenerative disc disease with a significant disc herniation at C6-7. Dr. Koprivica attributed this diagnosis to claimant's work-related accidents. Although both accidents contributed to claimant's condition, Dr. Koprivica felt the more significant accident of the two was the first injury, which resulted in the onset of the radicular symptoms. Dr. Koprivica believed claimant's cervical disc herniated at the time of his work accident in April 2008, since claimant had symptoms immediately in terms of symptoms radiating into his arms.

Dr. Koprivica saw claimant for the second time on February 5, 2010. Since Dr. Koprivica's first examination of claimant, claimant had returned to Dr. Jackson, who had ordered cervical epidural steroid injections. But claimant declined that treatment. Claimant had more physical therapy, but it did not provide him with any relief. Claimant told Dr. Koprivica that he had attempted to return to work in January 2010 and had been back to work almost two weeks. Claimant said he had not been given any work restrictions, and he was having significant problems with neck pain and tingling in his arms. Dr. Koprivica performed a physical examination of claimant on February 5, 2010, after which he opined

that claimant suffered from a disc herniation at C6-7 with chronic cervical thoracic pain with radicular symptoms into the upper extremities.

Using the *AMA Guides*,⁷ Dr. Koprivica rated claimant as being in the DRE cervicothoracic Category III, which assigns a 15 percent whole person impairment. He believed greater significance should be given to the first injury of April 2008 over the January 2009 injury. Dr. Koprivica recommended that claimant not frequently or constantly lift or carry items. For below chest level activities, Dr. Koprivica recommended claimant be restricted to 50 pounds maximum for occasional lifting or carrying. For overhead activities, claimant should be restricted to occasional lifting to less than 30 pounds. Claimant should avoid working on slick surfaces, jarring of the head and neck, repetitive pushing or pulling activities, and frequent or constant above shoulder activities. Claimant should be able to get out of a truck where whole body vibration is occurring while sitting.

Dr. Koprivica reviewed a task list prepared by Dick Santner. Of the 10 tasks on the list, he opined that claimant is unable to perform 5, for a 50 percent task loss. He did not believe that claimant was totally disabled.

Dr. Chris Fevurly is board certified in internal medicine and preventative medicine with a specialization in occupational medicine. At the request of respondent, he examined claimant on March 11, 2010. He diagnosed claimant with chronic cervical thoracic pain with symptoms suggestive of radiculitis from the cervical spine. He did not believe claimant's symptoms met the criteria for radiculopathy. He also diagnosed claimant with multilevel degenerative disc disease with disc herniations at C5-6 and C6-7.

Based on the *AMA Guides*, Dr. Fevurly rated claimant as being in DRE cervicothoracic Category II for a 5 percent permanent partial impairment to the body as a whole. He opined that claimant's neck symptoms and sporadic radiculitis are due to advanced cervical degenerative disc disease and cervical spondylosis. He found no objective factors of radiculopathy—no motor weakness, no sensory deficit, no loss of deep tendon reflexes, and no objective evidence for cord impingement such as upgoing Babinski's or positive Hoffman test.

Dr. Fevurly said claimant's degenerative disc disease and cervical spondylosis are not related to his employment but that claimant aggravated his degenerative disc disease by the heavy labor he performed at work. Dr. Fevurly believes that claimant aggravated his cervical thoracic degenerative disc disease when he partially fell off the truck on April 21, 2008. Dr. Fevurly testified that a significant number of people with disc herniations are asymptomatic. He could not say with any degree of medical certainty whether claimant's herniation occurred on April 21, 2008. Also, he said no suppositions can be made about

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

whether the disc herniation was present on April 21, 2008, based on the fact that claimant was able to work several months after injury. Regardless of whether the disc herniation occurred on April 21, 2008, Dr. Fevurly's opinion is that claimant suffered an aggravation of his preexisting degenerative disc disease through his work activities and specifically the accident of April 21, 2008. Claimant was asymptomatic in these areas prior to the work-related accident.

Dr. Fevurly recommended that claimant restrict his lifting to no greater than 50 pounds once or twice a day, occasionally he could lift 35 pounds, and frequently he could lift to 20 pounds. Lifting above shoulder level should be restricted to 10 pounds on an occasional basis with avoidance of repetitive overhead work with either upper extremity.

By agreement of the parties, Exhibits 2, 3, 4 and 5 to the Fevurly deposition are a part of the record. It is noted that Exhibit 2 is Dr. John Carter's medical report dated December 8, 2008. That report is a letter to respondent about an examination he performed concerning the injury of April 21, 2008, and begins ". . . the patient presented for an evaluation regarding back pain and spasm on the right side as well as some right shoulder pain."⁸ Dr. Carter concluded:

Assessment is right shoulder strain with right parathoracic spasm. The plan is that, due to the length of his symptoms and the fact he is wanting some instructions on how to help his spasm, he was sent to physical therapy for evaluation on a home exercise program today. He indicates he lives south and the closest place he can get physical therapy is Paola, Kansas. He preferred to do the physical therapy program on his own. He was subsequently dispensed a bottle of Flexeril, 10 milligrams, one tablet to be taken by mouth at bedtime for spasm, dispensed 15. He is to return to work and is to return to the clinic in two weeks. He was also dispensed a bottle of Banalg and instructed on how to use it. He is to use it three to four times daily.⁹

Exhibit 3 is Dr. Carter's record of his March 25, 2009, office visit with claimant. At that time, claimant complained of persistent symptoms which he described as

. . . a tingling in his upper thorax on the right side from the upper thoracic spine around to the anterior chest at or just below the nipple level. He describes it as a "raw meat" sensation. He has sharp pain intermittently in his left shoulder blade in an area he describes as a knot, but he also has intermittent pain in the right scapular region as well. He states it is better to sit and relax. The pain is not

⁸ Fevurly Depo., Ex. 2 at 1.

⁹ Fevurly Depo., Ex. 2 at 2.

constant. He still describes a problem of lifting his arm up (extended at the elbow with abduction of the arm at 90 degrees).¹⁰

Dr. Carter's assessment was paresthesia of the right thorax, approximately at T4, and thoracic strain—persistent pain.

Exhibit 4, physical therapy records from Allen County Hospital, indicate that on February 9, 11, 18, 20 and 27, and March 2, 4, 6, 9, 11 and 13, 2009, claimant was complaining of tightness and pain in the mid-scapular and thoracic regions. On February 27, claimant reported his right shoulder was doing better, but he had a weird feeling that wrapped around the right side of his back and pain between his shoulder blades.

Dr. Adrian Jackson's record of November 16, 2009, was introduced as Exhibit 5. The report indicates that Dr. Jackson discussed with claimant the options for treating the disc herniations at C5-6 and C6-7. These treatment options included surgery, epidural steroid injections, and additional physical therapy. Chiropractic treatment was also discussed.

Dick Santner, a vocational rehabilitation counselor, interviewed claimant on March 22, 2010, at the request of claimant's attorney. He prepared a list of 10 tasks that claimant had performed in the 15-year period before his April 2008 accident. Two tasks included on the list involve claimant's work when he was self-employed as a rancher. Claimant lives on a 350-acre farm and has a cattle operation. The only tasks listed for that operation were repairing and replacing fence, posts and gates and feeding cattle large round bales of hay, as well as salt and mineral blocks. Claimant testified that his only task involved in his cattle operation is feeding them in the winter, which he said was all done mechanically as he does not have square bales. There was no other testimony from either claimant or Mr. Santner about other possible tasks involved in running a cattle operation.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

¹⁰ Fevurly Depo., Ex. 3 at 1.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹² An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹³

K.S.A. 44-510d (Furse 2000) states in part:

(a) . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e (Furse 2000) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical

¹¹ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹² *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹³ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

Docket No. 1,046,360

The ALJ, in his Award of November 9, 2010, in Docket No. 1,046,360, made findings of fact and conclusions of law that are accurate and supported by the record. The Board adopts the ALJ's findings and conclusions as its own. It is noteworthy that since his accident on April 21, 2008, claimant has had consistent and ongoing complaints concerning his upper back and neck in addition to his right shoulder. These injuries have limited claimant's ability to work and to perform some of the job tasks he could previously do. Claimant's injuries are documented in the record and confirmed by the results of objective tests performed by the treating and examining physicians. The Board adopts the diagnosis and rating opinion of Dr. Koprivica, together with his restriction recommendations and percentage of task loss. The uncontradicted task list prepared by vocational expert Dick Santner, based upon his interview with claimant, is found to be accurate and reliable. Questions raised as to the completeness of that task list by respondent are based on conjecture. Those questions and allegedly omitted tasks are speculative and unsupported by the testimony. Dr. Koprivica reviewed the task list prepared by Mr. Santner and opined that due to his injuries and restrictions, claimant is now unable to perform 5 of the 10 total number of tasks listed. This represents a 50 percent task loss. When averaged with his 100 percent wage loss as of May 2, 2010,¹⁴ as required by K.S.A. 44-510e (Furse 2000), claimant's permanent partial disability is 75 percent. Prior to May 2, 2010, claimant's permanent partial disability is limited to his percentage of functional impairment, 15 percent.

Docket No. 1,046,362

In Docket No. 1,046,362, claimant alleged he suffered permanent injuries and aggravations of his preexisting conditions when the chair he was sitting on at work on January 15, 2009, broke and he fell to the floor. The ALJ found claimant suffered no permanent injury as a result of this January 15, 2009, accident. On this remand from the Court of Appeals to the Board, neither party argues that this accident caused or contributed to claimant's ultimate functional impairment or work disability such that claimant was

¹⁴ As decided by the ALJ in the Award entered November 9, 2010, at p. 3.

entitled to an award of permanent partial disability compensation in Docket No. 1,046,362. Although during the first oral argument to the Board on February 9, 2011, claimant's counsel announced that this docketed claim was not being abandoned and the nature and extent of claimant's disability resulting from this accident should be decided, claimant has now abandoned that argument.

In its Order dated February 24, 2011, the Board found "[c]laimant's injury in Docket No. 1,046,362 was temporary, and claimant has not shown that he is entitled to any temporary or permanent disability compensation or medical compensation in this docketed claim."¹⁵ Neither claimant nor respondent appealed that conclusion to the Court of Appeals. During the April 10, 2012, oral argument to the Board, the parties agreed that there are no issues for the Board to review in this docketed claim.

CONCLUSION

(1) In Docket No. 1,046,360, claimant sustained personal injuries to his right shoulder, upper back and neck from the work-related accident on April 21, 2008, and, as a result, has a combined percentage of functional impairment of 15 percent to the body as a whole, and a work disability of 75 percent.

(2) Claimant's injury in Docket No. 1,046,362 was a temporary aggravation of his injuries in Docket No. 1,046,360, and claimant has not shown that he is entitled to any temporary or permanent disability compensation or medical compensation in this docketed claim.¹⁶ The ALJ's finding that claimant's injuries in this accident occurred as a natural consequence of the injuries in the accident of April 21, 2008, which is the subject of Docket No. 1,046,360, is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 9, 2010, is modified to include exhibits 2, 3, 4 and 5 to Dr. Fevurly's deposition in the record but Docket Nos. 1,046,360 and 1,046,362 are otherwise affirmed.

In Docket No. 1,046,360, claimant is entitled to 32.86 weeks of temporary total disability compensation at the rate of \$372.83 per week or \$12,251.19 followed by 59.57 weeks of permanent partial disability compensation at the rate of \$372.83 per week or

¹⁵ *Nilges v. State of Kansas*, Docket Nos. 1,046,360 & 1,046,362, 2011 WL 800432 (Kan. WCAB Feb. 24, 2011).

¹⁶ Neither party raised any issues in Docket No. 1,046,362 concerning either the ALJ's Order of November 4, 2010, or the ALJ's Award of November 9, 2010.

\$22,209.48 for a 15 percent functional disability, followed by permanent partial disability compensation at the rate of \$465.17 per week not to exceed \$100,000 for a 75 percent work disability.

As of April 12, 2012, there would be due and owing to the claimant 32.86 weeks of temporary total disability compensation at the rate of \$372.83 per week in the sum of \$12,251.19 plus 59.57 weeks of permanent partial disability compensation at the rate of \$372.83 per week in the sum of \$22,209.48 plus 101.72 weeks of permanent partial disability compensation at the rate of \$465.17 per week in the sum of \$47,317.09 for a total due and owing of \$81,777.76, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$18,222.24 shall be paid at the rate of \$465.17 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Brad E. Avery, Administrative Law Judge